Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D C. 20554

In the Matter of	)	
	)	IB Docket No. 95-59
Preemption of Local Zoning	)	DA 91-577
Regulation of Satellite	)	45-DSS-MISC-93
Earth Stations	)	

FURTHER COMMENTS
AND
PETITION FOR CLARIFICATION
OF THE
SATELLITE BROADCASTING
AND COMMUNICATIONS ASSOCIATION OF AMERICA

Diane S. Killory
Joan E. Neal
Joyce H. Jones
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, D.C. 20006
(202) 887-1500

Counsel for the Satellite
Broadcasting and Communications
Association of America

April 15, 1996

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY 1

I. FURTHER COMMENTS 5

A. The FCC Should Exercise Its Exclusive Jurisdiction Over Satellite Services 6

B. The FCC Should Adopt A Waiver-Only Approach For Small Satellite Antennas 10

C. The FCC Should Adopt Its Proposed *Per Se* Rule For Private, Nongovernmental Restrictions 14

Example 1: Greenwood Valley Community Association, Sagamore Hills Township, Ohio 16

Example 2: Hamlet East Board of Managers, Nassau County, New York 18

Example 3: Virginia Run Community Association, Centreville, Virginia 20

II. PETITION FOR CLARIFICATION 23

A. Receive-Only Antennas May Not Be Regulated On Health Grounds 23

B. No Liability May Be Assessed For Actions To Install An Antenna Prior To A Final Commission Decision 24

C. Waivers May Be Granted Only If The Regulation Is Essential And No Broader Than Necessary 25

D. Specific Procedures For Declaratory Rulings And Waiver Petitions Should Be Adopted In This Rulemaking 27

CONCLUSION 29

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D C. 20554

In the Matter of	)	
	)	IB Docket No. 95-59
Preemption of Local Zoning	)	DA 91-577
Regulation of Satellite	)	45-DSS-MISC-93
Earth Stations	)	

FURTHER COMMENTS
AND
PETITION FOR CLARIFICATION
OF THE
SATELLITE BROADCASTING
AND COMMUNICATIONS ASSOCIATION OF AMERICA

Pursuant to the Report and Order and Further Notice of Proposed Rulemaking ("Order" or "Further Notice") released by the Commission on March 11, 1996 in the above-captioned proceeding, the Satellite Broadcasting and Communications Association of America ("SBCA") hereby submits these Further Comments and Petition for Clarification.

INTRODUCTION AND SUMMARY

SBCA commends the Federal Communications Commission ("FCC" or "Commission") on the important steps it has taken in the Order to strengthen its 1986 preemption policy. Because of the widespread problems that have continued to face existing and potential satellite antenna owners, this action was essential in order to further the important federal interest in ensuring that consumers "have wide access to all available technologies and information

services."[1] As a result, the satellite industry will be afforded the opportunity to become a viable competitor to existing video delivery systems.

Further Comments

The Commission's Further Notice focuses on implementation of the Congressional directives in the Telecommunications Act of 1996 ("1996 Act") with respect to direct-to-home ("DTH") satellite services in general, and direct broadcast satellite ("DBS") services in particular.[2] SBCA's Further Comments focus on two important issues raised in the Further Notice.

First, in response to the Commission's query regarding additional action that needs to be taken to implement the 1996 Act,[3] SBCA urges the Commission to commence immediately to exercise its exclusive jurisdiction over all satellite antenna regulations, restrictions and disputes. Such action would implement Section 205 of the 1996 Act, which explicitly grants to the FCC exclusive jurisdiction over DTH satellite services. In addition, such action would eliminate inconsistent state court rulings across the nation, thereby promoting competition in video services from the satellite industry by increasing consumers' confidence in their ability to install and maintain satellite antennas. It would also empower local authorities against cantankerous neighbors who want to thwart the federal policy, while stripping noncompliant local authorities of their ability to frustrate the policy.

---

[1] Order, at ¶ 15.

[2] As the legislative history of the 1996 Act indicates, "DBS is a direct-to home satellite broadcasting service which utilizes Ku-Band satellites." H.R. Rep. No. 204, 104th Cong., 1st Sess., pt. 1, at 123 (1995).

[3] Further Notice, at ¶ 59.

Second, in response to the Commission's question as to whether prospectively it should adopt a waiver-only approach for the small antennas governed by paragraph (b)(1) of its new rule, rather than the system of rebuttable presumptions adopted in the rule,[4] SBCA's answer is a resounding "yes." A waiver-only rule will enable the Commission to heed Congress' directive, set forth in Section 207 of the 1996 Act, that the FCC *prohibit* restrictions that impair a viewer's ability to receive DBS signals. A waiver-only rule will encourage local authorities to adopt valid antenna ordinances in the first instance, thereby obviating the need for unnecessary legal battles over the "privilege" of obtaining satellite service. At the same time, waivers will still allow case-by-case variances as warranted.

Third, SBCA strongly urges the Commission to act upon the unequivocal Congressional intent that the Commission expand the scope of its preemption rule to encompass private, nongovernmental restrictions of small satellite dishes. Prompt action is mandated by the 1996 Act and is essential if homeowners who are subject to restrictive covenants are to be afforded access to satellite services. SBCA has gathered many examples of such restrictive covenants, but these examples are truly only the "tip of the iceberg." To this end, the Commission should adopt proposed paragraph (f), establishing a *per se* preemption rule for private restrictions that impair consumers' ability to receive signals from satellite antennas one meter or smaller.

---

[4] *Id.*

Petition for Clarification

In order to implement a rule that is as clear and complete as possible to ensure prompt state and local government compliance, SBCA also urges the Commission to clarify four aspects of its preemption rule.

First, the Commission should amend the language of the rule to clarify that local governments may not regulate *receive-only* antennas for health reasons. As the FCC has already recognized (in its Order), receive-only antennas do not emit RF radiation. With respect to *transmitting* antennas, the FCC should make it clear that only legitimate RF regulation -- not bans masquerading as RF regulation -- will be permitted. Otherwise, the Commission's new preemption policy could be undermined by regulations hidden within the folds of the cloak of RF radiation regulation.

Second, the FCC should clarify that no liability may be assessed or action taken -- including, but not limited to the issuance of any directive or order requiring the disassembly of a satellite antenna -- against any person for actions taken to install a small satellite dish prior to a final Commission decision.

Third, the Commission should more clearly delineate the scope of its waiver rule by specifying that waivers will be granted only if the regulation is essential for preserving or protecting a highly specialized or unique feature of a particular location and, further, only if the boundaries of the particular location and the scope of the regulation are no broader than necessary to preserve or protect the highly specialized or unique feature. This clarification will prevent a flood of waiver applications to the Commission and, correspondingly, will prevent the necessity for satellite consumers to oppose spurious waiver applications.

Fourth, in order to implement its preemption rule efficiently and effectively, the FCC should specify in this further rulemaking the procedures it will use. To this end, SBCA proposes that the Commission place all declaratory ruling and waiver requests on public notice and accept comment from all interested parties. In addition, SBCA proposes herein a timeline for the submission of comments and replies, as well as for the resolution of each request.

I. FURTHER COMMENTS

The 1996 Act makes two important amendments to the Communications Act of 1934 ("1934 Act") regarding direct-to-home satellite services. First, Section 205 of the 1996 Act amends section 303 of the 1934 Act to include among the general powers of the Commission the "*exclusive* jurisdiction to regulate the provision of direct-to-home satellite services."[5] The legislative history explains that the purpose of this amendment is to make clear the FCC's exclusive jurisdiction in the arena of direct-to-home satellite services.[6] Second, section 207 of the 1996 Act directs the Commission to "promulgate regulations to *prohibit* restrictions that impair a viewer's ability to receive video programming services through devices designed for . . . direct broadcast satellite services."[7]

In light of the 1996 Act, the Further Notice requests comment on whether the Commission needs to take additional action to implement the 1996 Act. Specifically, the

---

[5] Telecommunications Act of 1996, Pub. L. No. 104-104, § 205(b), 110 Stat. 56, 114 (1996) (emphasis supplied) ("1996 Act"). The 1996 Act defines DTH satellite services as "the distribution or broadcasting of programming or services by satellite directly to the subscriber's premises without the use of ground receiving or distribution equipment, except at the subscriber's premises or in the uplink process to the satellite." *Id.*

[6] H.R. Conf. Rep. No. 458, 104th Cong., 1st Sess. 165 (1996).

[7] 1996 Act § 207 (emphasis supplied).

Commission asks whether its newly adopted rule fails in any respect.[8] And the Commission asks whether, with respect to DBS in particular, prospectively it should rely solely on waivers rather than the rebuttable presumption approach previously adopted.[9] In response to the former question, SBCA urges the Commission to amend its rule to exercise its exclusive jurisdiction over all satellite services. In response to the latter question, SBCA urges the Commission to adopt a waiver-only approach rule for direct broadcast satellite (and VSAT) dishes. These changes will permit the Commission to implement the directives of the 1996 Act as well as its underlying policies.

A. The FCC Should Exercise Its Exclusive Jurisdiction Over Satellite Services

In accordance with section 205 of the 1996 Act, the Commission should immediately exercise its exclusive jurisdiction over all satellite services. The case for exercising exclusive jurisdiction could not be more compelling. Indeed, the FCC has taken such action in far less explicit circumstances. In 1991, for example, the Commission issued a declaratory ruling in which it preempted any "state cause of action dependent on any determination of the lowest unit charge under Section 315(b) [of the Communications Act,] or of some other duty arising under that subsection . . ."[10] The Commission had to infer its authority to preempt from pronouncements in section 315 directing the Commission to adopt rules to implement the

---

[8] Further Notice, at ¶ 59.

[9] *Id.*

[10] *Exclusive Jurisdiction with Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934, as amended*, 6 FCC Rcd 7511 (1995) ("Section 315(b) Preemption Order").

lowest unit charge provisions contained in that section [11] Here, by contrast, Congress has unequivocally and explicitly conferred *"exclusive"* federal jurisdiction on the FCC with respect to DTH satellite services.[12] The case for exercising exclusive jurisdiction here is thus all the more compelling.

In addition to the statutory mandate that the FCC exercise exclusive jurisdiction here, there are strong policy and practical reasons for taking such action with respect to DTH services. As the legislative history makes clear, "[f]ederal jurisdiction over DBS service will ensure that there is a unified national system of rules reflecting the national, interstate nature of DBS service."[13] As in the lowest unit charge context, inconsistent court rulings will leave both antenna owners and state and local authorities "unsure of their respective rights and responsibilities" under the Commission's preemption policy.[14] The record previously compiled in this proceeding evidences many inconsistent state court rulings with respect to C-band antennas, and there is no reasonable hope that the same pattern will not continue to mark

---

[11] The Commission reasoned that Congress had implicitly preempted lowest unit charge causes of action because:

> (1) the purpose and character of the federal law revealed an intent to preempt; (2) potentially inconsistent interpretations of federal law could result from state court litigation; and (3) state causes of action would create an obstacle to fulfilling Congress' objectives under the federal statute.

Miller v. FCC, 66 F.3d 1140, 1143 (11th Cir. 1995) (citation omitted). The Commission also based its preemption decision upon the comprehensive rulemaking authority afforded to the agency in sections 315(d), 4(i) and 303(f) of the 1934 Act. *Id.*

[12] 1996 Act § 205(b) (emphasis supplied). In addition, as in the FCC's lowest unit charge preemption decision, preemption of both state causes of action and regulation of satellite services falls within the Commission's broad authority in sections 4(i) and 303(f) of the Act.

[13] H.R. Rep. No. 204 at 123.

[14] *See* Section 315(b) Preemption Order, at 7512. By "local authorities," we include here both governmental bodies and homeowners associations and boards. The case for exercising exclusive jurisdiction over any disputes that arise applies equally to both.

future court decisions regarding all types of satellite antennas. By assuming responsibility for all rulings on the propriety of satellite antennas, the Commission can implement a consistent national policy that will inure to the benefit of consumers and local authorities alike for a variety of reasons:

Centralizing all satellite antenna adjudications with the FCC will have the important benefit of establishing legitimate, uniform standards. Satellite antenna owners will not be impeded by irrational and unreasonable regulations or other restrictions in gaining access to satellite services -- which the Commission has explicitly, and appropriately, recognized as a strong federal interest.[15] Absent uniform standards, the specter of litigating the right to install and use a satellite antenna -- even absent direct action against consumers -- will simply lead many potential satellite consumers to abandon satellite service altogether. "Such a response to state lawsuits . . . would frustrate the Congressional intention to encourage greater" competition in the provision of programming services.[16]

In addition to affording potential satellite service consumers the certainty necessary to make the decision to use this developing technology, Commission-imposed consistency will encourage states and localities to impose and enforce rules that conform with the Commission's satellite policy. Uniform standards imposed by the Commission will thus avoid the need for citizens to litigate such regulations at every turn. In short, a vast amount of unnecessary litigation will be avoided altogether.

---

[15] 61 Fed. Reg. 10896, 10898 (1996) (to be codified at (47 C.F.R. § 25.104(a)(2)).

[16] Section 315(b) Preemption Order, at 7512.

When litigation does occur, centralizing the disputes at the Commission will minimize the burden on satellite consumers. Because the FCC proceedings are primarily "paper hearings," the costs will be far lower than those associated with a court battle, which can involve numerous court appearances, substantial formal discovery, motions practice and, ultimately, a trial. Moreover, while the FCC will need to be presented with the facts, it will not need to be educated with respect to the law. By contrast, there are thousands of courts across the nation, each of which might well be confronting the preemption issue for the first time and, therefore, will need to learn anew about this law. Indeed, there is no way that the state and district courts could ever bring the same level of expertise to bear that can be expected from the FCC. Particularly after precedent has been established at the FCC by a few rulings in this area, the Commission staff will be able to act expeditiously and with a minimum of burden imposed on the resources of the Commission or its staff.

To implement exclusive jurisdiction, the Commission should add a new paragraph (g) to section 25.104 as follows [17]

> (g) The sole forum for adjudicating any matters within this section shall be with the Commission.[18]

The Commission should also conform paragraph (b)(1) of its preemption rule by removing the "or a court of competent jurisdiction" language.[19]

---

[17] A red-lined version of the text of the preemption rule, with the amendments and clarifications proposed by SBCA, is attached hereto as Exhibit A.

[18] This language tracks the Commission's declaration of exclusive jurisdiction with respect to section 315(b). Obviously, this amendment is not intended to, nor could it, remove the right to appeal decisions of the Commission as provided by 47 U.S.C. § 402.

[19] This proposed change is necessary to implement the Commission's exclusive jurisdiction regardless of whether the FCC adopts the waiver-only rule proposed below.

B. The FCC Should Adopt A Waiver-Only Approach For Small Satellite Antennas

Although it adopted a reasonable presumption approach for small satellite dishes in paragraph (b)(1) of its rule, the Commission asks, whether, in light of the 1996 Act, it should prospectively adopt a waiver-only approach for those dishes. SBCA's answer is yes. A waiver-only preemption rule is necessary to implement the dictates of the 1996 Act. In section 207 of that Act, Congress directed the Commission to adopt rules that "*prohibit*" restrictions that impair a consumer's ability to receive video programming through direct broadcast satellite services.[20] Because a rebuttable presumption is a far cry from a prohibition, the Commission must reconsider its decision with respect to satellite antennas of one meter or less. Congress was not the least bit equivocal, and neither can the Commission be in its rule.

The rebuttal presumption rule is, in essence, a deferral to state and local authorities with respect to small dishes, albeit with some limits. The 1996 Act demonstrates, however, that in those areas where Congress intended to defer to the discretion of states and local authorities, it fully understood how to do so with clarity. The 1996 Act is replete with instances in which Congress explicitly conferred jurisdiction on or maintained the jurisdiction of local authorities. For example, with respect to the placement, construction and modification of personal wireless services facilities, Congress explicitly preserved the local zoning authority of state and local governments, subject only to certain federal limitations.[21] Congress

---

[20] 1996 Act § 207 (emphasis supplied).

[21] 1996 Act § 704(a) (to be codified at 47 U.S.C. § 332(c)(7)); *see also* 1996 Act § 101(a), § 2541(f) (to be codified at 47 U.S.C. § 254(f)) (with respect to universal service requirements, Congress provided that "[a] State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service."); 1996 Act § 101(a), § 251(d)(3) (to be codified at 47 U.S.C. § 251(d)(3)) (with respect to consistent access and interconnection obligations of local exchange carriers, Congress provided that the "Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission"); 1996 Act

provided: "[e]xcept as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof. . . ."[22] Similarly, when Congress conferred exclusive jurisdiction on the FCC with respect to the North American Numbering Plan, it explicitly authorized the Commission to delegate any part of its authority back to state commissions or other entities.[23] Had Congress similarly intended to permit the FCC to defer to local authorities with respect to the regulation of DBS antennas one meter or less in diameter, it would have included similar language in section 207. Such language -- or any proximity thereto -- is, however, glaringly absent. To implement the Congressional intent reflected in section 207, therefore, the Commission should adopt a waiver-only rule.

The legislative history fully supports this interpretation of Section 207. The Conference Report explains that section 207 of the 1996 Act is based on the House provision regarding satellite antennas. The House Committee Report, in turn, states that the intent of the provision was to "preempt enforcement of State or local statutes and regulations, or State or local legal requirements . . . that prevent the use of antennae designed for . . . receipt of DBS services."[24] The Report further states that existing regulations are simply "unenforceable to the extent contrary to this section."[25] Once again, the legislative intent is unequivocal with

---

§ 101(a), § 261(b) (to be codified at 47 U.S.C. § 261(b)) (with respect to the development of competitive markets for common carriers, Congress provided that "[n]othing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing [consistent] regulations after such date of enactment"). In addition, the 1996 Act amended the Public Utilities Holding Company Act of 1935, but explicitly provided that certain state rate authority was not preempted. 1996 Act § 103, § 34(j) (to be codified at 15 U.S.C. § 34(j)).

[22] 1996 Act § 704(a) (to be codified at 47 U.S.C. § 332(c)(7)).

[23] 47 U.S.C. § 251(e)(1).

[24] H.R. Rep. No. 204 at 123-124.

[25] *Id.*

respect to preemption. It does not speak of rebuttable presumptions. It speaks only of preemption.

A waiver-only approach will also better effectuate the strong federal policy in ensuring that small satellite antennas are available to virtually all consumers. A waiver-only approach will provide consumers with the assurance that they will not have to fight their local authorities for the right to install a small satellite dish.[26] If consumers are forced to undergo litigation over a rebuttable presumption, the typical satellite consumer will simply lack the stamina and financial wherewithal to withstand the battle. The typical prospective consumer will instead simply opt for some "easier" service. Such a result would, however, be in direct contravention of the federal interest in ensuring that consumers "have wide access to all available technologies and information services."[27]

A waiver-only rule will also encourage valid regulations and discourage unnecessary adjudications brought by local authorities. Local authorities applying for waivers will face higher hurdles than if they were merely seeking to rebut a presumption. Waivers are only available "upon a showing by the applicant that local concerns are of a *highly specialized or unusual nature.*"[28] A presumption, in contrast, could be more easily defeated.[29] At a

---

[26] Of course, in the unusual situation where the locality obtains a waiver, the locality should be allowed to enforce its rule.

[27] Order, at ¶ 15.

[28] 61 Fed. Reg. 10896, 10899 (1996) (to be codified at 47 C.F.R. § 25.104(e)) (emphasis supplied). As discussed in section II. C below, SBCA also proposes a more specific waiver standard.

[29] *Id.* at 10898 (to be codified at § 25.104(b)(2)). Currently, the presumption is rebutted upon a showing that the regulation is (1) necessary to achieve a "clearly defined health or safety objective" as stated in the text of the regulation, (2) "no more burdensome" than necessary "to achieve the health or safety objective" and (3) explicitly applicable to the class of antennas in paragraph (b)(1). Note that SBCA's proposed rule would eliminate the "health" rationale for enacting a local regulation. *See infra* section II. A.

minimum, because of the perception that a rebuttable presumption can be overcome more readily, the availability of a rebuttable presumption standard could actually encourage localities to test their antenna regulations by seeking declarations that the presumption has been rebutted. The practical effect of a waiver-only standard, therefore, will be to avoid a flood of requests for declaratory rulings from the Commission.

Finally, it should be noted that a waiver-only rule will, in many communities, actually empower the enforcement authority of local governments. It would be a mistake to assume that all local governments will act to restrict DBS dishes. A waiver-only rule will enable those local governments that do not wish to restrict DBS dishes to deflect easily the bombardment of complaints from a few cantankerous homeowners who seek to restrict their neighbors' ability to install satellite dishes.

For all these reasons the Commission should adopt a waiver-only approach for DBS one meter or less antennas. The Commission should apply also apply its waiver-only rule to other small dishes, *e.g.*, VSAT dishes used in commercial areas.[30] To adopt a waiver-only approach for these small dishes, the Commission should amend its rule as follows:[31]

> (b) Any state or local zoning, land-use, building, or similar regulation that affects the installation, maintenance, or use of:
>
> (1) a satellite earth station antenna that is two meters or less in diameter and is located or proposed to be located in any area where commercial or industrial uses are generally permitted by nonfederal land-use regulation; or

[30] While section 207 does not explicitly direct the Commission to adopt a waiver-only approach regarding other small antennas, neither does it prohibit such a rule. With respect to the two meter VSAT dishes used in commercial areas for data delivery, the 1996 Act and legislative history are silent. The House Committee Report only indicates that its mandate to the Commission to "prohibit" impairing restrictions does not include the larger C-band dishes. Accordingly, nothing in the Act or the legislative history prevents the Commission from extending a waiver-only approach to VSAT antennas.

[31] Deleted material appears with a line through it. New material appears in bold.

(2) a satellite earth station antenna that is one meter or less in a diameter in any area, regardless of land use or zoning category

~~shall be presumed unreasonable and is therefore~~ **is** preempted ~~subject to paragraph (b)(2)~~.

In addition, paragraph (b)(2) should be eliminated because the adoption of a waiver-only approach eliminates the need to include the standard for rebutting the presumptions.

C. The FCC Should Adopt Its Proposed *Per Se* Rule For Private, Nongovernmental Restrictions

In the Further Notice, the Commission proposes a *per se* preemption rule for private, nongovernmental restrictions on DBS-type satellite antennas. SBCA supports the proposal and urges the Commission to adopt proposed paragraph (f) expeditiously.

Adoption of a *per se* preemption of private, nongovernmental restrictions will implement the clear Congressional intent of section 207. The House Committee Report language accompanying the statutory provision upon which Section 207 of the 1996 Act was based explicitly states:

> The Committee intends this section to preempt enforcement of . . . restrictive covenants or encumbrances that prevent the use of antennae designed for . . . receipt of DBS services. Existing regulations, including . . . restrictive covenants or homeowners' association rules, shall be unenforceable to the extent contrary to this section.[32]

The proposed rule is also essential to effectuate the federal interest in ensuring consumer access to satellite signals from small antennas. Satellite consumers -- both potential and existing -- are plagued by restrictive covenants and HOA rules that are equal or broader in scope and force to their government-imposed counterpart -- zoning ordinances -- in impairing

---

[32] H.R. Rep. No. 204 at 123-24 (emphasis supplied).

their ability to receive satellite signals. Letters and phone calls received by SBCA, as well as court records, demonstrate that homeowners are frustrated in their efforts to install DBS dishes. By virtue of private restrictions, potential satellite consumers are confronted with countless delays, harassment unreasonable costs, prior written approval requirements (with approval rarely given), and, all too often, outright bans against the installation of satellite dishes generally or DBS dishes specifically

It is unclear precisely how many HOAs restrict these dishes. What is clear, however, is they exist in spades. Here is but a sampling of noncompliant HOA rules across the country:

- Virginia Run, Centreville, Virginia (total ban on satellite antennas)
- Ridgemoor Subdivision, Schererville, Indiana (total ban)
- Kopadruck Ridge Estates, Gig Harbor, Washington (total ban; HOA recommends cable service as a preferable alternative)
- Galena County Estates, Reno, Nevada (total ban on satellite antennas, but permits television antennas less than eight feet in height)
- Oak Run Subdivision, Ballwin, Missouri (total ban)
- Gold Hammock, Highlands County, Florida (total ban unless lot is larger than one acre)
- Crockett Cove, Brentwood, Tennessee (total ban)
- Glen Eden Garden Homes, Hayward, California (HOA interprets total ban on "outside television antenna[s]" to ban 18-inch dishes)
- Cross Creek Village Condominiums, Playa Del Rey, California (specific ban on 18-inch dishes)
- Leisure Village, Camarillo, California (specific ban on 18-inch dishes)
- Green Meadows West, Covina, California (specific ban on 18-inch dishes)
- Buena Park Summertree Development, Alisa Viejo, California (specific ban on 18-inch dishes)

- Continental 805 development, Inglewood, California (specific ban on 18-inch dishes)
- The Summit at Stone Oak, San Antonio, Texas (HOA approval required)
- Awbrey Butte Homesites, Bend, Oregon (HOA approval required)
- Huckleberry Community, Orlando, Florida (HOA approval required)

We emphasize that these are but a few examples of restrictive covenants of which SBCA is aware. Unquestionably, countless more examples of such restrictive CC&Rs exist. As is readily evident from even this small sample, however, these onerous restrictions span the nation. As is further evident from the following examples, moreover, challenging HOA rules in court is time-consuming, lengthy, expensive, and an unreliable means of obtaining relief. As the third example demonstrates, the 1996 Act has not diminished the fervor with which HOAs restrict homeowners' ability to install DBS dishes.

Example 1: Greenwood Valley Community Association, Sagamore Hills Township, Ohio[33]

In December 1994, after spending nine years attempting to correct substantial and repeated problems with the quality of her cable service,[34] Christine A. Wearsch, a resident of the Greenwood Valley community in Sagamore Hill Township, Ohio, decided to switch to a high power DBS service. Ms. Wearsch paid $1090 for an RCA 18-inch dish (including

---

[33] The account of Christine A. Wearsch's attempt to install her 18-inch antenna is taken from Ms. Wearsch's brief in opposition to her HOA's motion for summary judgment.

[34] Ms. Wearsch's cable company undertook numerous efforts to correct her "fuzzy" cable television reception. It replaced virtually all of her cable equipment and wiring inside her home. It replaced the wiring between the main cable box in her street and Ms. Wearsch's home. When these attempts proved unsuccessful, Ms. Wearsch purchased a state-of-the-art widescreen television in an effort to obtain better reception, but to no avail. Finally, the cable company informed Ms. Wearsch that nothing else could be done to improve her service. Although the cable company was in the process of an extensive system upgrade by replacing all of the main cables into Ms. Wearsch's neighborhood, because Ms. Wearsch lived on a sparsely inhabited street, she was informed that it would be years before the main cables on her street would be replaced.

installation). The 18-inch dish and associated wiring were mounted on the chimney of Ms. Wearsch's two-story house such that the antenna was not noticeable from the street in front of the home or from adjacent properties.

On March 23, 1995, Ms. Wearsch received a letter from the Greenwood Valley Community Association ("GVCA"), the HOA for her development, informing her that she had violated the provisions of the HOA's Declaration of Covenants and Restrictions that stated that "[n]o external or outside antennas of any kind shall be maintained."[35] Ms. Wearsch refused to remove the antenna because she could perceive of no interest of the association or her neighbors that was affected by the antenna attached to the chimney, the association had itself maintained a satellite antenna outside the community's recreation center, and she would otherwise be unable to have a clear picture on her television.

On April 28, the HOA's attorney wrote to Ms Wearsch, demanding removal of her antenna and threatening legal action. The letter explained that strict enforcement of the community's covenants was necessary or "chaos [would] be the order of the day" as residents would pick and choose which rules to follow and which to ignore. After receiving this letter, Ms. Wearsch retained legal counsel.

Ms. Wearsch's attorney commenced negotiations with the HOA in an attempt to reach an acceptable resolution of the dispute, but the HOA would not agree to permit Ms. Wearsch to retain her satellite antenna. One letter sent on behalf of the HOA demonstrates its unyielding position, even with respect to small satellite antennas:

> How could the [HOA] allow your client to have an 18 inch satellite antenna and not allow another owner to have a 10 foot diameter

---

[35] Letter from Christy Nicolo, Greenwood Valley Community Association Manager, to Christine A. Wearsch (Mar. 23, 1995) (on file with Summit County, Ohio Ct. of Common Pleas, Case No. CV95-08-2786.)

> satellite antenna? How could the [HOA] allow your client to have any satellite antenna and not allow another owner to have a 40 foot radio antenna or television antenna?[36]

When Ms. Wearsch refused to remove her 18-inch dish, the HOA commenced legal action against Ms. Wearsch in state court.

Just last month, Ms. Wearsch moved to stay the proceedings in light of section 207 of the 1996 and the FCC's rulemaking to implement that section. GVCA did not oppose the motion for stay and in fact conceded that the FCC's proposed rule might "render GVCA's Restrictive Covenants as to 'antennas' to be unenforceable which would effectively bring this litigation to a termination."[37] Nonetheless, the court denied the motion for stay. Ms. Wearsch's case is pending.

Example 2: **Hamlet East Board of Managers, Nassau County, New York[38]**

Richard and Shirley Cohen sought to install an 18-inch satellite antenna to receive DBS signals on the roof of their condominium townhouse, one of a number of connected townhouses sharing a common roof in a development of 162 homes in the Hamlet East section of Nassau County, New York. The Cohens wanted access to approximately 135 channels of additional programming that was unavailable through their cable service provider or through the master television antenna serving their condominium. In early October 1994, Mr. Cohen

---

[36] Letter from William J. Ockington, representing the GVCA, to Paul J. Stano, attorney for Ms. Wearsch (July 10, 1995) (on file with Summit County, Ohio Ct. of Common Pleas, Case No. CV95-08-2786.)

[37] Resp. of Pl. to Mot. for Stay of Proceedings, *Greenwood Village Community Association v. Wearsch*, (Ohio C.P. Summit County) No. CV 95-08-2786 (filed Mar. 26, 1996).

[38] The account of the Cohens' litigation is taken from the article, *Supreme Court Rules Against DSS Owner*, Transponder, Dec. 1995, at 1, 29 and court records.

sought approval of the community's Board of Managers ("Board") for the installation of the dish. The five member Board voted for approval of Mr. Cohen's antenna by a 2-1 margin with 2 members of the Board abstaining. Believing he had obtained approval, Mr. Cohen proceeded to spend more than $1000 installing the necessary equipment to receive DBS.

After Mr. Cohen had completed the installation, he was informed by the Board that it had not approved his antenna because permission required the affirmative vote of a majority of the Board. The Cohens repetitioned the Board for approval and were denied. The Board objected to the 18-inch dish on "aesthetic" grounds, even though the dish was not visible from the front of the Cohens' home or from the street and was barely visible from the side of the home. The Board also stated that it had a "no satellite dish" policy in effect.

When the Cohens refused to remove their dish, the Board sued them, seeking an injunction to force removal of the antenna, as well as damages and attorneys' fees. Although the Board admitted that it had no specific declaration or by-law that addressed satellite dishes, the Board argued that its decision was based on the prohibition against alteration of any exterior or common element (including the roof) without Board approval. On the Board's motion for summary judgment, the Supreme Court for Nassau County ordered the removal of the antenna.[39] The Cohens have petitioned for rehearing of the summary judgment motion. Their petition is still pending

[39] The Board spent approximately $16,000 in attorneys' fees prosecuting its claim against the Cohens (although the court vacated its initial decision to award attorneys' fees). Had Mr. Cohen not been an attorney able to represent himself and his wife *pro se*, they would have had to spend a comparable amount defending their actions.

Example 3: **Virginia Run Community Association, Centreville, Virginia**[40]

In December 1994, Greg Mathieson a resident of Virginia Run, a planned development in Centreville, Virginia, decided to install an 18-inch satellite antenna. As a member of the news media, Mr. Mathieson had a strong interest in following the news. As a result, he had a bank of television sets in his living room and various other rooms in his house so that he could simultaneously view all of the networks and other news programs. Initially, Mr. Mathieson used cable service to access these news programs, but he began to experience problems with the picture quality and found his cable service to be unreliable, particularly in bad weather. Mr. Mathieson felt that satellite service would better serve his needs.

On January 3, 1995, Mr. Mathieson attended the meeting of the Architecture Review Board ("ARB") of Virginia Run Community Association ("VRCA"), the HOA for his development, to seek approval to install an 18-inch dish. He also submitted a written application to the ARB. Mr. Mathieson explained to the ARB his reasons for wanting satellite services and argued that VRCA did not prohibit the large green cable pedestals that facilitate cable service and stand, clearly visible, alongside the curbs of his neighbors' homes. Mr. Mathieson argued that VRCA should not, therefore, prohibit his proposed 18-inch dish that would be considerably less visible.

By letter of January 31, 1995, the ARB denied Mr. Mathieson's application. The ARB informed him that exterior satellite dishes were prohibited by the "Architecture and Design

[40] The account of Mr. Mathieson's attempt to install an 18-inch DBS antenna is taken from the Declaration of Greg E. Mathieson attached hereto as Exhibit B.

Guidelines" for Virginia Run. The letter also stated that he could amend his application or appeal the decision to the ARB, in writing, within 10 days.

In response to the ARB's letter of denial, Mr. Mathieson sent a letter to the ARB requesting an appeal and the right to present the appeal in person before the ARB. He presented his appeal to the ARB at the ARB's committee meeting. In addition to his previous arguments, he also presented the ARB with a number of court decisions preempting local ordinances that prohibited satellite antennas. On April 6, 1995, the ARB denied Mr. Mathieson's appeal. The letter of denial cited Architectural and Design Guideline No. 2.0: "Antennas. Exterior antennas, satellite dishes or similar devices are prohibited," and again invited Mr. Mathieson to amend his application or appeal the decision within ten days.

On June 22, 1995, Mr. Mathieson again requested the right to appeal the ARB's decision in person. This time, his appeal was directed to the Board of Trustees of VRCA. His presentation to the Board of Trustees included a presentation from a salesperson at Sears who explained the installation process for 18-inch dishes and brought along an 18-inch dish for the Board to view. In addition, one of Mr. Mathieson's neighbors, who worked for a satellite dish manufacturer, attended the meeting on his behalf to explain the need for an exterior line of sight in order to obtain satellite service. The Board of Trustees denied his application.

Subsequently, Mr. Mathieson learned that the recently enacted 1996 Act contained a provision regarding preemption of private restrictions of DBS antennas. He checked the FCC's web site on the Internet and found section 207 of the 1996 Act, as well as the FCC's February 29 press release describing the Commission's new preemption rule and its proposed rule preempting HOA restrictions on DBS satellite antennas.

On March 29, 1996, Mr. Mathieson submitted a new application to install an 18-inch satellite antenna and, on April 2, 1996, attended the ARB's meeting to discuss his new application and to present the ARB with copies of section 207 as well as the FCC's press release. The ARB still indicated that it was inclined to reject his application, although it stated that it would submit these materials to its attorney.

Despite the language of section 207 and the Commission's proposed rule, members of the ARB continued to raise "aesthetic" objections to Mr. Mathieson's proposed 18-inch dish. In addition, members of the ARB informally expressed their fears that if the ARB allowed residents to install satellite antennas on their property, if foliage on surrounding common property grew and potentially blocked the line of sight for such antennas, residents might ask VRCA to remove that foliage. Finally, certain members of the Board of Trustees (who work in other sectors of the telecommunications field) expressed the opinion that the services he wanted from DBS would eventually be available through his telephone lines. Thus, in their opinion, he did not need to subscribe to satellite services.

Throughout this process, Mr. Mathieson has been told by members of VRCA that he should be patient because VRCA "might" decide to amend its rules to permit certain satellite antennas.[41] It is, however, becoming increasingly apparent to Mr. Mathieson that it is unlikely that a new rule permitting 18-inch dishes will be adopted anytime soon. In the meanwhile, Mr. Mathieson has yet to install an 18-inch satellite dish because of the impending threat, under

[41] To this end, VCRA conducted a survey of the approximately 1,500 homeowners in Virginia Run asking, among other things, whether the homeowners were in favor of permitting 18-inch satellite dishes to be installed on their property. Of the 500 responses received, approximately 80 percent of the homeowners were in favor of permitting 18-inch dishes. Despite this overwhelming approval response, Mr. Mathieson has now learned that VRCA nevertheless intends to hold a public hearing to decide whether to modify its architectural guidelines with respect to 18-inch dishes.

VRCA's rules, that he could be fined $10 per day for violation of the Association's rules until the violation is corrected.

* * *

The 1996 Act is intended to eliminate just these types of scenarios. To implement the 1996 Act's directives and to enable homeowners to receive DBS signals without first engaging in protracted disputes with their HOAs, the Commission should, in response to its Further Notice, adopt proposed paragraphs (f) and (g).

II. PETITION FOR CLARIFICATION

In its earlier comments in this proceeding, SBCA emphasized the importance of crafting a preemption rule with language that was "*as clear and complete as possible in order to facilitate compliance by local authorities and, accordingly, to minimize the number of disputes in which the Commission will need to become involved.*"[42] While the rule adopted by the Commission makes substantial progress toward this end, the Commission should further clarify four aspects of its rule.

A. Receive-Only Antennas May Not Be Regulated On Health Grounds

The Commission acknowledges in the text of its Order that receive-only antennas do not emit radiation and, therefore, a local ordinance "could not use RF emission hazard concerns as a basis to regulate receive-only antennas."[43] The Commission's rule should

---

[42] SBCA Comments, at 24 (emphasis in original).

[43] Order, at ¶ 35; *see also id.* at ¶ 52 ("we are not aware of any reasonable health concerns associated with installation of receive-only antennas that do not emit radiation").